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No. 84-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN,

Petitioner,

v.

MARIO MEROLA, District Attorney,
Bronx County, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DIVISION FOR THE PURPOSE OF APPOINTING INDEPENDENT COUNSEL, ETHICS IN GOVERNMENT ACT OF 1978

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PRELIMINARY STATEMENT

Petitioner Raymond J. Donovan respectfully submits this reply to the brief of Mario Merola, District Attorney of Bronx County, New York, the only respondent who has opposed Mr. Donovan's petition for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978 (the "Special Court").[1]

1 Significantly, neither the Justice Department nor former Special Prosecutor Leon Silverman opposes this petition.

The District Attorney's brief to this Court is a howling wilderness of misstatements both of fact and of law. That brief conceals the real issues before this Court and attempts retroactively to put on the record matters that should have been—but were not—disclosed long ago. In sum, as we shall demonstrate below, the District Attorney seeks to justify his conduct by resorting, too late, to totally baseless arguments that, even if they had been raised at the proper time, could never have justified a disclosure of federal grand jury materials.

Before addressing the purported legal arguments in the District Attorney's brief, we must set the record straight as to certain portions of his Statement of the Case. Leaving aside the portions of the District Attorney's self-serving narrative that are not relevant to this petition, in the first full paragraph on page 4 of the District Attorney's brief and again on pages 5-6, the District Attorney repeatedly, deliberately, and misleadingly uses the word "limited" to describe the disclosures by the Special Court to him of grand jury records. The record demonstrates that this characterization is just plain wrong. For, in every instance, the Special Court granted *precisely* the disclosure sought by the District Attorney, without any limitation whatsoever. In other words, the District Attorney takes the preposterous position that, when, without making the requisite showing of need, he received everything he asked for, that receipt was "limited," since he did not ask for the entire grand jury record.

ARGUMENT

POINT I

THE SPECIAL COURT LACKED JURISDICTION TO ORDER DISCLOSURE OF THESE MATTERS THAT OCCURRED BEFORE THE GRAND JURY

The District Attorney engages in a long and largely irrelevant discussion of the legislative history of the Ethics in Government Act in an attempt to demonstrate that the Special

Court had jurisdiction over the minutes of the grand jury. The District Attorney's argument, however, fails to show (as it must if the District Attorney is to prevail) that the grand jury transcripts disclosed to him are "portions" of the Special Prosecutor's report. The Special Prosecutor's report is *all* that the Special Court has jurisdiction to release. 28 U.S.C. § 595(b)(3) (1982). The mere fact that the grand jury minutes were filed and stored with the Clerk of the Special Court does not, of course, make them part of the report. The Ethics in Government Act surely does not make these grand jury materials part of the report. The report itself does not incorporate them. Indeed, former Special Prosecutor Leon Silverman has stated that they were not part of the report. Thus, the repeated attempts in the District Attorney's brief to equate portions of the report to records over which the Special Court has jurisdiction is both unsupported and false.

POINT II

THE BRONX DISTRICT ATTORNEY'S APPLICATIONS TO THE SPECIAL COURT AND THE SUBSEQUENT DISCLOSURES VIOLATED RULE 6(e)

The District Attorney argues that his applications for disclosure of grand jury materials were made to the correct court and that such applications sufficiently demonstrated compelling necessity or particularized need for such materials. He is clearly wrong on both counts.

First, at page 17 of his brief, the District Attorney asserts that the grand jury whose record is at issue here was "empaneled" by the Special Court. This is simply not true. Not only does the Special Court lack jurisdiction to empanel grand juries, but the record in this case demonstrates that the grand jury was empanelled by the United States District Court for the Eastern District of New York. Moreover, Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure requires that "[a] petition for disclosure pursuant to subdivision (e)(3)(C)(i) *shall be filed* in the *district* where the grand jury convened." (emphasis

added) Thus, the rule required the District Attorney to petition the District Court in the Eastern District of New York. His circumvention of the rule by petitioning the Special Court was plainly unauthorized and illegal.

The District Attorney attempts to excuse his further violation of Rule 6(e) in failing to notify Mr. Donovan of the application for grand jury materials by stating that:

> "Petitioner was not a party to the judicial proceeding since the Bronx County, New York grand jury investigation was an *ex parte*, secret proceeding and consequently, service of notice on petitioner was not required by the Rule." Respondent's Brief in Opposition at 18.

The District Attorney's *ipse dixit* fails to mention, however, that Rule 6(e)(3)(D) mandates that (even assuming *arguendo* that the Bronx County grand jury investigation was a "judicial proceeding") his application for disclosure could not be *ex parte*, for such an *ex parte* application can be made only by the federal government. Moreover, even in his illegal "*ex parte*, secret" applications to the Special Court for disclosure of grand jury materials, he did not identify Mr. Donovan or any of the other officers or employees of Schiavone Construction Company as possible targets of his investigation. Nor did he serve written notice on either the Justice Department or any of his *identified* targets.[2] Had he done so, Mr. Donovan, the Justice Department, and others would have had an opportunity to be heard. Instead, as demonstrated in the affidavit of Paul J. Curran (A. 25-26), the District Attorney affirmatively misrepresented to the Special Court the nature of the grand jury investigation, apparently to avoid just such notice to Mr. Donovan.

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2 It is clear that the District Attorney should also have notified the federal grand jury witnesses whose testimony he sought, as well as the owners of documents subpoenaed by the federal grand jury. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.8 (1979).

Finally, the District Attorney asserts lamely that his applications to the Special Court demonstrated compelling necessity or particularized need.[3] A mere reading of the four applications establishes that they did not even come close to meeting this test. Further, it is plain that the claims now put forth to satisfy this requirement (at pages 19-21 of the District Attorney's brief to this Court) were never presented to the Special Court at all. Thus, the District Attorney now states, without record support, at page 19 of his brief:

> "Similarly, the division of the court was aware of the compelling necessity for these materials in view of the absence of any other source and the inability to utilize compulsory process, since a compelled appearance before a New York grand jury automatically confers transactional immunity on a subpoenaed witness. Thus, these factors supported disclosure to avoid a possible injustice."

In so stating he asks this Court to accept a rationale that he never presented to the Special Court and which the Special Court never had the opportunity to consider, let alone rule upon.

The propriety of this belated claim of particularized need is, in any event, highly dubious, since, as the District Attorney admits, he sought the federal grand jury materials in order to *deprive* various individuals of *rights* granted to them under the laws of New York State. In this regard he fails to mention that, on September 24, 1984, Mr. Donovan waived immunity and testified voluntarily before the Bronx County grand jury. (A. 22) Thus, as to Mr. Donovan, even this argument is totally devoid of merit.

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3 The true extent of the District Attorney's lack of "need" for the federal grand jury transcripts was revealed when the prosecutors selectively read excerpts from them to the Bronx grand jury. Indeed, a large part of the grand jury presentation in the Bronx consisted of prejudicially edited federal grand jury testimony obtained from the Special Court in violation of Rule 6(e).

In sum, the record shows that the Special Court lacked jurisdiction to release these grand jury materials. Moreover, even if, *arguendo*, it had jurisdiction, the District Attorney's applications failed totally to comply with the requirements of Rule 6(e).

CONCLUSION

For the reasons stated herein and in the petition for a writ of *certiorari*, the petition should be granted.

Dated: April 17, 1985

Respectfully submitted,

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